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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]76

JOHN A. VENZEL,
Petitioner,

v.

UNITED STATES STEEL COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

Counter-Statement of Question Presented 1

Counter-Statement of Facts 1

Argument in Opposition to the Granting of the Writ... 2

I. The Decision Below Is in Harmony With Decisions of All Courts of Appeals and District Courts Which Have Considered the Question ... 2

II. The Decision Below Does Not in Any Way Violate the Principle of Oakley v. Louisville & Nashville Railroad Co., 338 U. S. 278 5

Conclusion 7

TABLE OF AUTHORITIES.

Cases.

Bostian v. Seaboard Airline R. Co., 34 L. R. R. M. 2047 6

Bryan v. Griffin, 166 Fed. 2d 748 (1948) 4

Diehl v. Lehigh Valley R. R. Co., 211 Fed. 2d 95 6

Doyle, et al. v. Division No. 1127 of Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of America, et al., 76 F. Supp. 655, aff'd 168 Fed. 2d 876 (C. A.-5th, 1948) 4

Johnson v. Interstate Transit Lines, 71 F. Supp. 882, aff'd 163 Fed. 2d 125 (C. A.-10th, 1947) 3-4

Lesher v. P. R. Mallory & Co., Inc., 166 Fed. 2d 983 (1948) 3

Meredith v. Industrial Rayon Corp., Civil No. 24689 (N. D. Ohio, 1949) 4

National Torch Tip Co., 107 N. L. R. B. No. 269, 33 L. R. R. M. 1369 ---------- 6

Oakley v. Louisville & Nashville Railroad Co., 338 U. S. 278 ---------- 5, 6

Payne v. Wright Aeronautical Corporation, et al., 162 Fed. 2d 549 (3rd Cir.) ---------- 4

Statute.

Selective Training and Service Act of 1940 ------1, 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 763.

JOHN A. VENZEL,
Petitioner,

v.

UNITED STATES STEEL COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondent contends that the case was rightly decided by the Court of Appeals for the Sixth Circuit. The decision below is in accord with the decisions of other Courts of Appeals, *not* in conflict therewith. The decision below is *not* probably erroneous and does *not* depart from the teaching of any of the opinions of this Court.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Does one employed on probation for a fixed period, during which period his employment may be terminated at will by the management, hold a position other than temporary within the meaning of Section 8 of the Selective Training and Service Act of 1940?

COUNTER-STATEMENT OF FACTS.

This case was decided upon the pleadings which consisted of an amended complaint and an answer. Therefore, these documents alone determine the facts which

underlie the decision below. Respondent accepts the statement of facts of the Petitioner except in two instances where the facts are misstated.

There is no basis for Petitioner's statement (Pet. p. 3) "that petitioner would have completed his initial probationary term satisfactorily on September 16, 1943." This is nowhere alleged in the amended complaint and therefore not admitted in the answer. The fact as disclosed by the pleadings is that at the time Petitioner entered military service, he had completed 89 days of his period of probationary employment. In his amended complaint Petitioner makes no claim either that his services were satisfactory or that he would have completed his probationary term of employment. The Court below therefore was confronted with the naked fact that Petitioner was employed for a fixed probationary term and left his employment before that term was completed.

Neither is it correct to say that Petitioner "resumed his employment with respondent on May 28, 1946" (Pet. p. 3). Petitioner was employed by the defendant on May 28, 1946 "as a new employee" (Amended Pet., par. 7, R. 4a; Ans., par. 7, R. 6a).

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

I. The Decision Below Is in Harmony with Decisions of All Courts of Appeals and District Courts Which Have Considered the Question.

Every Federal Court which has passed upon the status of employees entering military service while employed in a probationary status for a fixed term has held that such probationary employees were in temporary positions upon induction and were therefore not entitled to the protection of the Selective Training and Service Act of 1940.

The first Circuit Court of Appeals to pass upon this was the Court of Appeals for the Seventh Circuit. There in *Lesher v. P. R. Mallory & Co., Inc.*, 166 Fed. 2d 983 (1948), the facts were substantially identical to those in the instant case. In the *Lesher* case the probationary employee had worked 77 days of his 90-day probationary term while here Petitioner had worked 89 days of his three-month probationary term. This difference in fact is of course one only of degree and does not differentiate the cases in principle. In declining to extend the protection of the Act to Lesher, the Court said at page 986:

> "That plaintiffs were employed on a trial or probationary basis of 90 days is not open to question. This is shown not only by the contracts between the defendant and the union but by the testimony of defendant's personnel director. It was testified by the latter that it was defendant's policy as an employee's probationary period neared its end to obtain a report from his foreman with the view of ascertaining if his work was satisfactory. If so, his employment continued, provided he had become a member of the union in the meantime; otherwise, he was let go. *Plaintiffs argue that they 'were giving satisfactory service and surely would have attained seniority if the draft had not prevented it.'* That, of course, is in the realm of speculation and does not aid plaintiffs' cause. *The purpose of the Act, as we have shown, was to preserve for veterans upon their return the employment status they occupied at the time they left for military service, and not to create a status which they never had, even though it might have been attained had they not been called.*" (Emphasis supplied.)

Similar conclusions have been reached by all Federal Courts which have considered the position of a probationary employee entering military service. See *John-*

son v. Interstate Transit Lines, 71 F. Supp. 882, aff'd 163 Fed. 2d 125 (C. A.-10th, 1947); *Doyle, et al., v. Division No. 1127 of Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of America, et al.*, 76 F. Supp. 655, aff'd 168 Fed. 2d 876 (C. A.-5th, 1948); *Meredith v. Industrial Rayon Corp.*, Civil No. 24689 (N. D. Ohio, 1949).

None of the cases cited by Petitioner, in fact, conflict with the decision below.

The case of *Payne v. Wright Aeronautical Corporation, et al.*, 162 Fed. 2d 549 (3rd Cir.) is not in point. In the *Payne* case the Court did not have before it the character of the position which the plaintiff left upon entering military service. It had no occasion to and did not determine whether such position was "one other than temporary." In the *Payne* case the plaintiff's position prior to entering military service was not probationary. The question, in fact, decided in the *Payne* case was the effect of a collective bargaining contract, *entered into after plaintiff entered the service*, upon plaintiff's seniority status. No more—and no less.

The decision below is not in conflict with decisions holding that employment at will is "other than temporary." This same argument was made below not only by Petitioner through his then counsel, but by present counsel for Petitioner who appeared below as counsel for the *amicus curiae*.

The flaw in the argument advanced by Petitioner was recognized in the decision below. For a position held "at will" to be other than temporary, it must not only be held at will, but *must be for an indefinite period of time*. This is illustrated by the holding of the Court below in *Bryan v. Griffin*, 166 Fed. 2d 748 (1948), wherein the Court dis-

tinguished between temporary and other than temporary positions, saying at page 750 of the report:

> " 'Temporary,' we think means 'lasting for a time only,' or casual, as distinguished from regular. * * * Since employment *for an indefinite period* was contemplated in a position to be held at mutual will until terminated, we think the position was 'other than temporary.' " (Emphasis supplied.)

In distinguishing the instant case from the type of cases referred to by Petitioner at page 7 of his argument, the Court below said:

> "In *Bryan v. Griffin*, 166 Fed. (2d) 748, C. A. 6th, relied on by the appellant, we held that an employment for an indefinite period in a position to be held at mutual will until terminated was employment in a position other than temporary. Such employment is not similar to the probationary employment in the present case, which was expressly limited to three months and was on a trial basis." (R. fol. 19.)

The distinction made by the Court below is applicable to all of the cases in which the position left by the veteran involved employment for an indeterminate period. Here the only contract of employment held by the Petitioner at the time of his induction was for a fixed temporary probationary period of three months.

II. The Decision Below Does Not in Any Way Violate the Principle of Oakley v. Louisville & Nashville Railroad Co., 338 U. S. 278.

Petitioner contends that the decision below negates the "escalator" or "continuous employment" principle adopted by this Court and most recently enunciated in *Oakley v. Louisville & Nashville Railroad Co.*, 338 U. S. 278. As we read the *Oakley* case the decision therein an-

nounced is limited to holding that the protection afforded by the Selective Training and Service Act to a returning veteran is not limited to the first year of his employment after his return from service but rather that his rights secured by the statute continue beyond the first year of his reemployment "subject to the advantages and limitations applicable to the other employees."

There is nothing in the facts of this case or in the decision below which either involves the question decided in the *Oakley* case or in any way derogates therefrom.

Neither *Diehl v. Lehigh Valley R. R. Co.*, 211 Fed. 2d 95, nor *Bostian v. Seaboard Airline R. Co.*, 34 L. R. R. M. 2047 are in point. Both deal not with the character of a position which a veteran left upon entering military service but rather with the effect upon a veteran's status of collective bargaining agreements entered into after he entered such service.

National Torch Tip Co., 107 N. L. R. B. No. 269, 33 L. R. R. M. 1369, is just as clearly inapposite to the problem decided below. The question considered by the National Labor Relations Board in that case was to determine those employees of an employer who might vote in a representation election ordered by the National Labor Relations Board. Of necessity the Board was required to interpret for the purpose the definition of employee contained in the National Labor Relations Act as amended, which definition says, "the term 'employee' shall include *any employee* * * *."

Never has Respondent contended that Petitioner was not its employee at the time he entered the service. Rather the contention is that such employee was employed in a position "other than temporary," as that phrase is used in the Selective Service and Training Act. Clearly the prob-

lem determined by the National Labor Relations Board has no bearing upon that decided by the Court below.

CONCLUSION.

The question posed by the petition for certiorari is not novel. It has already received the attention of three Courts of Appeals and several District Courts. The decision below is in harmony with the decisions of two other Courts of Appeals and with those of the District Courts.

Moreover, enough has been said to indicate that the decision below is correct, not probably erroneous.

The fact that this unanimous body of Federal decisions may affect large numbers of people or many labor contracts is no reason for this Court to consider the matter. The fact that the question has had consideration by several District Courts and at least three Courts of Appeals without any conflict in the conclusions reached should suffice.

It is therefore respectfully submitted that the petition for the writ of certiorari should be denied.

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